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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1984

THE ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND ..... *Petitioner*

V.

DUANE COOLEY ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Stewart E. Niles, Jr.
Donna G. Klein
Vivian L. Madison
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street
New Orleans, Louisiana 70112
(504) 581-6641

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I.

May a Mississippi state court exercise jurisdiction over a Louisiana hospital, when the quality and nature of its activities in Mississippi are *de minimis* contacts, as in *Wolf v. Richmond County Hospital Authority*, 745 F.2d 904 (4th Cir. 1984), and when its contacts are insufficient to support an exercise of jurisdiction under *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984) and *Braman v. Mary Hitchcock Memorial Hospital*, 631 F.2d 6 (2nd Cir. 1980)?

II.

May the State of Mississippi exercise *quasi in rem* jurisdiction over a nonresident defendant, pending final judgment in unrelated litigation, by ordering attachment of his property within the state, when the seized indebtedness is wholly unrelated to the cause of action, when the plaintiff, who is not a creditor, has no present interest in the property seized and when the nonresident defendant is not provided meaningful notice or the right to be heard?

LISTING OF ALL PARTIES TO THE PROCEEDINGS BELOW

I.

Duane Cooley - Plaintiff

II.

The Administrators of the Tulane Educational Fund - Defendant

III.

Hattiesburg Clinic, P.A. - Defendant

IV.

Board of Trustees of State Institution of Higher Learning, University of Southern Mississippi, and University of Mississippi - Attachment-Defendant (Dismissed)

V.

Gibson's Storeowners Association Employer Benefit Trust and Gibson's Distributors of Hattiesburg, Mississippi, Inc. - Attachment - Defendant (Dismissed)

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OCTOBER TERM 1984

NO. _____

The Administrators of the
Tulane Educational Fund ..... *Petitioner*

v.

Duane Cooley ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, the Administrators of the Tulane Educational Fund, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi in *The Administrators of the Tulane Educational Fund, a Louisiana Corporation versus Duane Cooley*, entered on December 12, 1984, rehearing denied on February 13, 1985.

OFFICIAL REPORTS FROM COURTS BELOW

The opinion of the Supreme Court of Mississippi in *The Administrators of the Tulane Educational Fund, a Louisiana Corporation v. Duane Cooley,* entered on December 12, 1984, rehearing denied on February 13, 1985, is reproduced at Appendix I hereto, page A-1, *infra*. The opinion of the Chancery Court of Forrest County, Mississippi entered on October 16, 1982 is reproduced at Appendix II, hereto Page A-24, *infra*. The opinion of the Chancery Court of Forrest County, Mississippi, entered on October 7, 1982 is reproduced at Appendix III, hereto, page A-26, *infra*. The opinion of the Chancery Court of Forrest County, Mississippi entered on February 24, 1982 is reproduced at Appendix IV, hereto, page A-30, *infra*. The opinion of the Chancery Court of Forrest County, Mississippi entered on October 13, 1981 is reproduced at Appendix V, hereto Page A-33, *infra*.

GROUNDS FOR INVOKING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner seeks to have the Court review the Order of the Supreme Court of the State of Mississippi entered on December 12, 1984, and the order, entered on February 13, 1985, denying petitioner's petition for rehearing *en banc*.

This Court has jurisdiction to review this matter pursuant to 28 U.S.C. §1257(3).

This Court may have jurisdiction by appeal to review this matter pursuant to 28 U.S.C. §1257(2).

This Court may have jurisdiction to review this matter pursuant to 28 U.S.C. §2403(b).

CITATION TO PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

I.

Miss. Code Ann. §11-31-1 through §11-31-9, the text of which is set forth at Appendix VI, hereto, page A-37, *infra*.

II.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. United States Constitution, Amendment XIV.

STATEMENT OF CASE

This is a medical malpractice action filed against The Administrators of the Tulane Educational Fund (hereinafter "Tulane") as a result of treatment rendered to plaintiff's decedent, a Mississippi domiciliary, at Tulane Hospital in New Orleans, Louisiana. Plaintiff's decedent voluntarily presented, was treated and died at Tulane Hospital. Plaintiff filed suit in Mississippi State Court against Tulane Hospital and Hattiesburg Clinic P.A., which had also rendered care to plaintiff's decedent.

Plaintiff joined the University of Mississippi and South Mississippi University as attachment-defendants, pursuant to Miss. Code Ann. §11-31-1 through §11-31-9, which is attached as Appendix VI. Plaintiff asserted a claim, pending the outcome of the malpractice suit, on any monies which these two schools owed to The Administrators of the Tulane Educational Fund as a result of intercollegiate athletic contracts.

Plaintiff also joined Gibson's Storeowners Association Employer Benefit Trust and Gibson's Distributors of Hattiesburg, Mississippi, Inc., decendent's employer, as attachment-defendant because the Trust held sums owed to Tulane under decedent's health insurance policy. The policy had been procured by decedent's employer, and benefits had been assigned to Tulane but not yet paid by Gibson's. All attachment-defendants, voluntarily and ***without a hearing***, paid into the registry of the court the monies owed Tulane and were dismissed from this action pursuant to orders of the Chancellor dated October 13, 1981 and February 24, 1982. These orders are attached and appear as Appendices V and IV, respectively. Tulane received no meaningful notice of the hearings, and was not afforded an opportunity to be heard on the attachments.

Tulane moved to dismiss the action on grounds that it is a corporation organized under the laws of the State of Louisiana, is not subject to service of process within the State of Mississippi, and is not subject to the personal jurisdiction of any court of the State of Mississippi. Tulane has never applied for nor received a certificate of authority to do business in the State of Mississippi and it has never done business in the State of Mississippi. Tulane has never maintained any office, bank account, mailing address, telephone listing, or other business facility within the State of Mississippi, and it has never had any affiliates or subsidiaries which engaged in business in the State of Mississippi. Tulane does not own, nor has it ever owned, any property in Mississippi, nor has it ever been called upon to pay any tax to the State of Mississippi. Tulane has never solicited any business, placed any advertisement, or had any publication printed in the State of Mississippi. It in no way solicited the treatment of plaintiff's decedent. The Chancellor denied Tulane's motion to dismiss on the 7th day of October, 1982, a copy of which is attached hereto as Appendix III, and entered an order granting interculotory

appeal on October 16, 1982, a copy of which is attached hereto as Appendix II.

The Supreme Court of the State of Mississippi upheld the decision of the Chancellor in an opinion dated December 12, 1984; and denied petition for rehearing on February 13, 1985. This opinion and denial of rehearing are attached hereto as Appendix I.

In his decision for the court, Justice Robertson relied on assumptions and non-documented "judicially-noticed facts" as a basis for finding that Tulane had sufficient contacts with the State of Mississippi: (1) Tulane University recruits Mississippi students; (2) Tulane University offers scholarships to Mississippi citizens; (3) The University invites citizens of Mississippi to participate in seminars and continuing education programs for which fees are charged; (4) Tulane University students engage in intercollegiate competitions with students from Mississippi's colleges and universities; and (5) Tulane University has a substantial number of alumni and friends in Mississippi from whom it solicits and receives financial contributions. None of these assumptions relate to the instant cause of action.

Justice Robertson also relied on facts made available through discovery interrogatories answwered in the Chancery Court: (1) Senior medical students and residents of Tulane School of Medicine may receive on-the-job training with Mississippi doctors and hospitals; (2) Tulane faculty members provide lectures at Biloxi hospitals on a monthly basis, and ophthalmology residents rotate on a short-term basis through the V.A. Hospital in Biloxi, Mississippi; (3) Tulane faculty members conduct medical seminars at Meridian, Mississippi; (4) Sixty-three physicians who are members of the honorary staff of Tulane Medical Center reside in Mississippi; and (5) Tulane Hospital provides care and treatment for patients who reside in Mississippi. In support of statement (5), the court noted that Judy Cooley,

plaintiff's decedent, was treated at Tulane Hospital, and also noted that a Mississippi patient was treated while a patient at Tulane Medical Center in the case of *T.C.L., Inc. v. LaCoste*, 431 So.2d 918 (Miss. 1983) [Only one phrase in the entire opinion even mentioned Tulane Hospital].

Noticeably absent from the court's opinion was any indication that Tulane Hospital had ever solicited business or placed any advertisement in any publication printed in Mississippi in order to obtain patients for its New Orleans, Louisiana facility. There was no finding by the court that Tulane actively solicited or encouraged nonresidents to travel to Tulane Hospital for treatment, or that it had patient referral or transfer contacts as in *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984). Neither did the court find that Tulane Hospital had any agreements with Mississippi State Hospitals, such as an agreement to serve as consultants or supply backup services to hospitals in Mississippi as noted in *Braman v. Mary Hitchcock Memorial Hospital*, 631 F.2d 6 (2nd Cir. 1980). Nothing in the opinion established the right of a Mississippi state court to exercise jurisdiction over Tulane for a claim concerning hospital services performed in Louisiana.

GROUNDS FOR ALLOWANCE OF WRIT OF CERTIORARI

Rule 17 provides that this Court may exercise its discretion to review a case when a state court of last resort has decided a federal question in a way in conflict with the decision of a federal court of appeals, or has decided an important question of federal law which has not been, but should be settled by this Court.

The Mississippi Supreme Court misapplied controlling Federal Law when it exercised jurisdiction over nonresident Tulane Hospital

This Court addressed the issue of fairness in *quasi in rem* proceedings in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *Shaffer* required that the safeguards of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) be present before a state may constitutionally exercise *quasi in rem* jurisdiction over a nonresident defendant, so "...that the maintenance of the suit [does] not offend '[T]raditional notions of fair play and substantial justice.' " 433 U.S. at 212. While there is no feasible test to mathematically calculate the fairness of subjecting a nonresident defendant to the jurisdiction of a state with which he may have some contact, it is clear that there must be an examination of "...the relationship among the defendant, the forum, and the litigation." 433 U.S. at 204, 207.

This Court rejected the contention that a defendant who had caused "effects" within the state was subject to jurisdiction in that state in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). A defendant must have "purposely availed" himself of the benefits and protection of the forum state's law before the forum may exercise jurisdiction. In *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this court refused to equate a defendant's ability to "forsee" the possibility of a suit in the forum state without that defendant having "purposely availed" himself of the laws of the forum state. 444 U.S. at 297.

The opinion of The Supreme Court of Mississippi, entered on December 12, 1984, rehearing denied February 13, 1985, was that there need be no connection between the forum and the acts giving rise to the litigation, overlooking the requirement of *Shaffer v. Heitner, supra*, that the court focus its attention upon the relationship among the defendant, the forum and the litigation. Where, as here, there is absolutely no connection between the forum and the acts which give rise to the litigation (the decedent had made a

conscious decision to seek medical care outside of the forum state), there is no constitutional power of Mississippi to adjudicate the important rights of Tulane as a nonresident defendant.

While the legal standard to be applied in the due process analysis of jurisdiction is well established, the application of that standard has produced inconsistent results when determining whether an out-of-state hospital's treatment of unsolicited patients from a forum state may serve as a basis for that state to constitutionally assert jurisdiction over the out-of-state hospital in a medical malpractice action. In ***Wolf v. Richmond City Hospital Authority***, 745 F.2d 904 (4th Cir. 1984), a Georgia hospital was held to have ***de minimis*** contacts with South Carolina when there was no evidence that the Georgia hospital solicited business in South Carolina, although the hospital treated South Carolina residents and received payment for services rendered. Additionally, the hospital did not have a listing in the South Carolina telephone directory. The hospital did have a contract with a laundry service in South Carolina, and was also subject to a hospital authority agency that affected both Georgia and South Carolina. The Georgia hospital received one-fifth of its income from South Carolina patients. Noting that "cases involving medical services are quite different from those involving other commercial activities," 745 F.2d at 911, the Fourth Circuit ruled that the Georgia hospital lacked sufficient contacts with the State of South Carolina to be subject to the jurisdiction of its courts.

The *Wolf* court was consistent with the decision in ***Gelineau v. New York University Hospital***, 375 F. Supp. 661 (D.N.J. 1974), where the New York University Hospital's sole contact with New Jersey was the fact that some of its employees resided there. *Wolf* is also consistent with the case of ***Walters v. St. Elizabeth Hospital Medical Center***, 543

F. Supp. 595 (W.D.Pa. 1982), where a Pennsylvania court was held to have no jurisdiction over an Ohio hospital in a suit brought by Pennsylvania residents who were treated at the Ohio hospital after having been referred there by Pennsylvania physicians.

While the facts of the case at bar are more similar to those in ***Wolf***, ***Gelineau*** and ***Walters***, all ***supra***, the Mississippi Supreme Court decided the instant case should be governed by the decisions of the Second and the Ninth Circuits in ***Braman v. Mary Hitchcock Memorial Hospital***, 631 F.2d 6 (2nd Cir. 1980), ***Cubbage v. Merchent***, 744 F.2d 655 (9th Cir. 1984) and the district court decision of ***Soares v. Roberts***, 417 F. Supp. 304 (D.R.I. 1976). A review of these cases reveals factual patterns distinctly different than in the instant case.

In ***Braman***, the Second Circuit remanded a suit brought by a Vermont resident against a New Hampshire hospital for determination of whether there were continuous, intentional, and active Vermont contacts to support jurisdiction. In remanding the case for substantiation of the record, the court noted that the New Hampshire hospital maintained listings in several Vermont telephone directories, and that it received more than 33 percent of its patients from Vermont. In addition, there was an agreement with Blue Cross/Blue Shield for New Hampshire and Vermont as a bi-state organization providing medical insurance to both states. In addition to the Blue Cross/Blue Shield agreement, there were several other agreements between Vermont hospitals and the New Hampshire hospital, which revealed a close relationship among hospitals in both states. Despite the innumerable contacts, the Second Circuit refused to rule that the Vermont court had jurisdiction over the New Hampshire hospital until evidence of the various agreements was made part of the record below.

In *Cubbage v. Merchent, supra,* suit was brought in a California court against an Arizona hospital. The *Cubbage* court focused on whether the Arizona hospital had continuous and systematic contacts with the State of California, and whether it purposefully took some action so as to invoke the protection of California law. The court found that a small percentage of hospital employees were residents of California; the Arizona hospital maintained listings in the white and yellow pages of the Parker Telephone Directory which was distributed in the area of California adjacent to Arizona. Approximately 26 percent of the hospital's patients were California residents. The doctors involved in the suit had applied for and were issued California Medi-Cal numbers, and received reimbursement either directly or indirectly from the State of California for those patients. In holding that the California court could exercise jurisdiction, the court noted that the Arizona hospital and its doctors conducted continuing efforts to provide services to California, including solicitation of patients.

In *Soares v. Roberts, supra,* a Rhode Island court was held to have jurisdiction over a Massachusetts medical facility and one of its staff physicians when it was found to have solicited patients from Rhode Island and sought to provide an alternative to services licensed and provided by the State of Rhode Island.

In determining whether an out-of-state hospital is subject to the jurisdiction of a forum state for its treatment of the residents of the forum state, the Circuit Courts of Appeals have consistently allowed or refused such jurisdiction based on whether the out-of-state hospital had solicited patients or advertised its services in the forum state.

In the instant case, there is no evidence whatsoever that Tulane Hospital solicited patients from Mississippi. While it is true that Tulane University students conduct

intercollegiate competition with students of Mississippi institutions of higher learning, such a factor should have no bearing upon whether Tulane Hospital purposely availed itself of the laws of the State of Mississippi. Any other contacts of Tulane University, or of the Tulane School of Medicine should be irrelevant when determining whether the hospital, which operates a single facility in New Orleans, Louisiana, and does not solicit patients or advertise its services in the State of Mississippi, has availed itself of the laws of the State of Mississippi.

The decision of the Mississippi Supreme Court is in conflict with the decisions of the Federal Circuit Courts of Appeals, and, thus, merits review by this Honorable Court in order to settle this important question of what type of contacts are necessary to constitutionally support jurisdiction by a forum state of a medical malpractice action against an out-of-state hospital.

Mississippi's nonresident attachment statute is unconstitutional on its face and as applied to Tulane Hospital

The Mississippi nonresident attachment statute which provided the basis for jurisdiction in the instant case has been declared unconstitutional by both federal district courts in Mississippi. ***MPI v. McCullough***, 463 F. Supp. 887 (N.D. Miss. 1978); ***Mississippi Chemical Corp. v. Chemical Construction Corp.***, 444 F. Supp. 95 (S.D. Miss. 1977). ***See also NAACP v. Claiborne Hardware Company***, 458 U.S. 886, 890 at footnote 5 (1982). The attempt by the Mississippi Legislature in 1980 to amend the attachment statute did not cure its constitutional defects. Miss. Code Ann. §11-31-1 does not adhere to the ***Schaffer*** requirement that there be a nexus between the property seized and the underlying claim. Moreover, the attachment statute does not afford the

principal defendant, (i.e., the nonresident debtor) the procedural safeguards afforded the attachment-defendant.

Although the amended version of the Mississippi attachment statute was designed to meet the objections outlined in *Miss. Chemical Corp. v. Chemical Construction Corp.* and *MPI v. McCullough, supra*, the statute fails to meet one important objective of constitutional dimension: the statute allows the attachment of property which is unrelated to the plaintiff or to his cause of action.

The Third Circuit, in *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3rd Cir. 1976), struck down an assertion of state court jurisdiction based solely on the presence of property in the state where the cause of action bore no significant relationship to that property. Two years later, this Court declared in *Schaffer* that the presence of property in the state alone would not support state court action where the property was wholly unrelated to the cause of action. The court held that minimum contacts must be present to confer *in rem* or *quasi in rem* jurisdiction over a foreign defendant. 433 U.S. at 208-209. In his majority opinion, Justice Marshall cited the *Jonnet* decision as a "well reasoned lower court opinion" that had "questioned the ancient proposition that the presence of property in a state gives the state jurisdiction to adjudicate rights to the property regardless of the relationship of the underlying dispute and the property owner to the forum." *Id.* at 205.

In *Rush v. Savchuck* 245 N.W.2d 624 (Minn. 1976), *rev'd* 444 U.S. 325 (1980), this court held that the State may not consitutionally exercise *quasi in rem* jurisdiction over a defendant by attaching the contractual obligation of an insurer. 444 U.S. at 332-33. In *Rush*, plaintiff, a resident of Indiana, was injured in an accident in Indiana while riding as a passenger in a car driven by the defendant, also an

Indiana resident. After moving to Minnesota, plaintiff commenced an action against defendant Rush in the Minnesota State Court, alleging negligence and seeking damages. The plaintiff attempted to obtain *quasi in rem* jurisdiction by garnishing the contractural obligations of State Farm Mutual Automobile Insurance Company (State Farm) to Rush in connection with such a suit. State Farm had insured the car under a liability policy issued in Indiana. Rush and State Farm moved to dismiss the complaint for lack of jurisdiction over the person. The trial court denied the motion to dismiss and the Minnesota Supreme Court affirmed, ultimately holding that the assertion of *quasi in rem* jurisdiction complied with the due process standards enunciated in *Schaffer*. *See* 245 N.W.2d 624 (Minn. 1976) *and* 274 N.W.2d 999 (Minn. 1978), *rev'd* 444 U.S. 321 (1980).

In reversing the Minnesota court, this Court concluded that the fictional presence in Minnesota of State Farm's policy obligation to Rush could not be deemed to give the state the power to determine Rush's liability for the out-of-state accident. The mere presence of property in a state does not establish the sufficient relationship between the owner of the property and the state to support the exercise of jurisdiction over a cause of action. It could not be said that the defendant engaged in any activity related to the forum that would make the exercise of jurisdiction fair merely because the insurance policy was attached there. Such a policy does not provide significant contacts between the litigation and the forum. 444 U.S. at 328-30.

Tulane is in an analogous position to that held by the defendant in the *Rush* case. The property attached in Mississippi has no relationship to the cause of action instigated by Duane Cooley and the assertion of jurisdiction by the Mississippi Court runs contrary to the principles enunciated by this Court in *Rush*. By retaining jurisdiction, the Mississippi Court has adopted a complex and ancient fiction which

has been expressly rejected by this Honorable Court. This fiction, according to the mandate of *Rush*, cannot be deemed to give Mississippi the power to determine Tulane's liability for the out-of-state cause of action. *See id.* at 328

The Second Circuit Court of Appeals applied *Rush* retroactively in *Holzsager v. Valley Hospital*, 646 F.2d 792, 794 (2nd Cr. 1981). There the plaintiffs brought a wrongful death action against a nonresident hospital and attempted to obtain personal jurisdiction through *quasi in rem* attachment of an insurance policy issued to the hospital by a resident insurer. After reviewing the *Schaffer-Rush* line of cases, that court concluded that such attachment of a *rem* which is unrelated to the cause of action is violative of due process. The court could not obtain jurisdiction in the absence of minimum contacts. *See Sarcceno v. S. C. Johnson & Son*, 492 F. Supp. 979, 981 (S.D.N.Y. 1980) [applying *Rush* retroactively to deny *quasi in rem* jurisdiction over insurance policy].

The *Holzsager* factual basis is almost identical to this litigation. Such use of *quasi in rem* process has been directly forbidden by this Court as well as the clear majority of decisions addressing this question. *See Bank of America National Trust & Savings Assoc. v. GAC Properties Credit, Inc.*, 389 A.2d 1304, 1308-1309 (Del. Ch. 1978) [Court struck down the use of Delaware sequestration statute to obtain *quasi in rem* jurisdiction over defendants which were not otherwise subject to personal jurisdiction of the court]; *Balcon, Inc. v. Sadler*, 244 S.E.2d 164 (N.C. Ct. App. 1978) [In dismissing suit, court noted that the attached property had no relationship to the cause of action as required by *Schaffer*]; *C.O.W., Inc. v. Motor Vehicle Divisions*, 586 P.2d 107-109 (Or. Ct. App. 1978) [Property in question must have some relationship to cause of action under *Schaffer*].

The New York Supreme Court addressed this problem in *Majique Fashions Ltd. v. Warwick & Co., Ltd.*, 409

N.Y.2nd 581 (N.Y. 1978), and stated in unambiguous terms that

> [W]here property serving as the basis for state court jurisdiction...is unrelated to the plaintiff's cause of action and there is an absence of...other ties between the defendant, the state, and the litigation, the attachment of such property will not support the state's jurisdiction.

Id at 583. *See also Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971), *cert. denied*, 404 U.S. 948 (1971) ["extensive contacts"]; *Guas v. M. V. Olympic Pegasus*, 557 F.2d 65 (4th Cir. 1977), *cert. denied*, 434 U.S. 969 (1977) ["substantial contacts"].

In allowing the attachment of property unrelated to the cause of action, without meaningful notice and a right to be heard by the principal debtor (nonresident defendant), the Mississippi attachment statute also violates the Constitutional standards set forth in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1967), *Fuentes v. Schevin*, 407 U.S. 67 (1972), *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974), and *North Georgia Finishing, Inc. v. Di-Chen, Inc.*, 419 U.S. 601 (1975).

Mitchell is not dispositive of this point because in *Mitchell* the question was not whether a debtor's property could be seized by his creditors, *pendente lite*, where they held *no present interest* in the property. In the instant case, the plaintiff not only has no present interest in the attached property, but he is not a creditor of the defendant, Tulane. In *Mitchell*, the court's concern was with balancing the competing interests of a creditor and a debtor, while in the instant case only Tulane has a present interest in the attached property.

This Court limited the scope of *Mitchell* in *North Georgia Finishing*, where the plaintiff garnished the defendant's bank account. The Court stressed that *Fuentes* was still good law and, therefore, notice and a hearing must be given to a defendant before his property is seized, absent "extraordinary situations". 407 U.S. at 90. In *North Georgia Finishing*, the Court stated that the Georgia statute was vulnerable for the same reasons. The *North Georgia Finishing* majority refused to limit *Sniadach* (garnishment of wages) to its facts. The Court had noted in *Mitchell* that "[T]he suing creditor in *Sniadach* had no prior interest in the property attached." 416 U.S. at 614. Therefore the proposition that *unrelated* property cannot be attached upon the mere initiation of a law suit, absent meaningful notice and a hearing before attachment, is still good law. In this regard, it is significant that Miss. Code Ann. §11-31-3 does not require that the principal defendant receive notice prior to attachment so as to afford an opportunity to be heard. Moreover, the other procedural safeguards afforded the attachment-defendant (resident debtor) are not similarly afforded the principal defendant (nonresident debtor).

The Mississippi attachment statute cannot withstand constitutional scrutiny under *Schaffer* and *Rush* because it allows for attachment of property of a nonresident defendant unrelated to the cause of action (which in this case arose in Louisiana). Neither can the statute withstand scrutiny under *Fuentes*, *Sniadach*, *Mitchell* and *North Georgia Finishing* because it allows for attachment by a plaintiff-creditor with no present interest in the property and provides *no* procedural safeguards to the principal defendant non resident debtor).

The decision of The Mississippi Supreme Court is thus in conflict with decisions of the Federal Circuit Courts of Appeals, as well as with decisions of this Court, and merits

review by this Honorable Court in order to settle these important Constitutional challenges.

For the foregoing reasons, it is submitted that a Writ of Certiorari should issue to review the December 12, 1984 and February 13, 1985 decisions of the Supreme Court of Mississippi.

Respectfully submitted,

The Administrators of The
Tulane Educational Fund,
Petitioner

By: /s/ Stewart E. Niles, Jr.
Stewart E. Niles, Jr.
By: /s/ Donna G. Klein
Donna G. Klein
By: /s/ Vivian L. Madison
Vivian L. Madison
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street
New Orleans, Louisiana 70112
(504) 581-6641

Attorneys for Petitioner

CERTIFICATE OF SERVICE

We, Stewart E. Niles, Jr., Donna G. Klein, and Vivian L. Madison, are attorneys for petitioner herein, state that we have this 13th day of May, 1985, caused to be deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari, to the Honorable J. Robert Ramsay, attorney for the respondent, Duane Cooley, at his mailing address of P.O. Box 1584, Hattiesburg, Mississippi, 39401, and to the Honorable Dorrance Aultman, attorney for the defendant, Hattiesburg Clinic, P.A., at his mailing address of P.O. Drawer 750, Hattiesburg, Mississippi, 39401, and to the Honorable Edwin L. Pittman, Attorney General for the State of Mississippi, P.O. Box 220, Jackson, Mississippi, 39205.

/s/ Stewart E. Niles, Jr.
Stewart E. Niles, Jr.
/s/ Donna G. Klein
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/s/ Vivian L. Madison
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Attorneys for Petitioner

APPENDIX

APPENDIX I

IN THE SUPREME COURT OF MISSISSIPPI

THE ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND,
A LOUISIANA CORPORATION — Appellant

VERSUS

DUANE COOLEY — Appellee

I.

This interlocutory appeal presents the question whether New Orleans-based Tulane University may, consistent with the Constitution of the United States, be made amendable to valid and enforceable adjudications of its important rights and duties in the courts of the State of Mississippi.

Plaintiff Duane Cooley seeks recovery for the alleged wrongful death of his wife, Judy Billingsly Cooley. He has brought an attachment action in the Chancery Court of Forrest County under Miss. Code Ann. §11-31-1, *et seq.* (Supp. 1984), a *quasi in rem* proceeding, if you will. Pursuant thereto, there have been seized and brought within the power of the court the proceeds of debts owed to Tulane by Mississippi parties having an aggregate value of $147,677.50. Cooley seeks no in personam judgment against Tulane nor any other recovery of and from Tulane beyond the debts attached.

Tulane strenuously argues that the Chancery Court's efforts to subject its property to jurisdiction are inconsistent with Tulane's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United

States, upon which there has been recent authoriative elaboration n ***Shaffer v. Heitner***, 433 U.S. 186, 97 S.Ct 1569, 53 I Ed.2d 683 (1977) and ***Rush v.Savchuk***, 444 U.S. 320, 100 S t 571, 62 L.Ed.2d 516 (1980).

For the reasons set forth below, we find Tulane's arguments without merit and affirm.

II.

On June 2, 1981, Duane Cooley as personal representative of Judy Billingsley Cooley, deceased, commenced this wrongful death action by filing his complaint in the Chancery Court of Forrest County, Mississippi. Cooley has since amended his complaint. Defendants below were Hattiesburg Clinic, P.A., a professional association doing business in Forrest County, Mississippi, and The Administrators of the Tulane Educational Fund, A Louisiana Corporation (herein "Tulane University" or sometimes "Tulane"). Tulane is the sole Appellant here.

Subject matter jurisdiction has been predicated upon the Chancery Attachment Statute, Miss. Code Ann. §§11-31-1, ***et seq.*** (Supp. 1984), pursuant to which Cooley demanded that the court attach and bring before it certain effects of, or indebtedness owed to, Tulane University said to be located in Mississippi.

Two such indebtednesses of the nonresident defendant Tulane University have in fact been seized and brought within the control of the court. These are:

(A) The sum of $48,182.00 owed to Tulane University arising out of an intercollegiate athletic contest between the football teams of the University of Southern Mississippi and Tulane University. The record reflects that the game was played in Hattiesburg, Mississippi, and that the sums due

and payable to Tulane were in the hands of the University of Southern Mississippi when the attachment process issuing out of the Chancery Court was served and thereby effectively bound such sums to await the outcome of this action.

(B) The sum of $99,495.50 which is owed to Tulane University by virtue of unpaid for medical care, treatment and services rendered to the late Judy Cooley by Tulane Hospital and Medical Center. These sums were seized while in the hands of Gibson's Storeowners Association Employer Benefit Trust, hereinafter "Gibson's Trust". Judy Cooley during her lifetime was an employee of Gibson's Distributors of Hattiesburg, Inc., hereinafter "Gibson's Hattiesburg", a Mississippi corporation. As such, she was covered by a health insurance policy procured by Gibson's Trust. The care and treatment and hospitalization services rendered to Judy Cooley were covered by this health insurance plan. Pursuant to that policy, Gibson's Trust owed $99,495.50 to Tulane and, before said sums were paid, process of attachment issuing out of the Chancery Court of Forrest County was served upon Gibson's Trust subjecting said sums to the jurisdiction of the Court during the pendency of this action.

All attachment defendants, having paid into the registry of the court the monies owed Tulane, have been finally dismissed from this action.

B.

The facts relevant to the issues tendered on this interlocutory appeal have to do with Tulane's activities in, and contacts with, the State of Mississippi. Many of these facts we glean from the record. Others are within our judicial knowledge.

This Court, of course, may take judicial notice of adjudicative facts at any stage of the proceedings, whether requested to do so by a party or not. ***Walls v. Mississippi State Bar***, 436 So.2d 30, 33 (Miss. 1983); ***Moore v. Grillis***, 205 Miss. 865, 39 So2d 505 (1949). A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within this state or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

To begin with, indebtednesses to the aggregate tune of some $147,677.50 were found and seized in Forrest County. These valuable properties owned by Tulane certainly represent contacts with Mississippi. There is much more.

Tulane University is a private, non-sectarian university comprising 11 academic divisions with close to 10,000 students. The university has been duly organized and exists as an educational corporation under the laws of the State of Louisiana. As all know, Tulane's principal place of business is in New Orleans, Louisiana.

As the crow flies, Tulane is less than a hundred miles from parts of southern and southwestern Mississippi. It is within the actual as well as judicial knowledge of the members of this Court that, although the nerve center of Tulane's educational and service programs is in Louisiana, the university has a variety of contacts with Mississippi and engages in a plethora of activities in and related to Mississippi.

Most basic is the educational function of the university. Tulane recruits Mississippi students. Because of its excellent reputation in all academic areas, Tulane is successful in this endeavor. It offers scholarships to Mississippi citizens incident to their pursuit of the educational opportunities available at Tulane.

Tulane engages in substantial continuing education programs. The different colleges and schools of the university invite citizens of this state to participate in seminars and continuing education programs[1]. Fees are charged those taking part in these programs. Tulane students engage in a variety of intercollegiate competitions with students from Mississippi's colleges and universities. Most familiar are the athletic contests, wherein almost annually Tulane competes with the University of Southern Mississippi, Mississippi State University, the University of Mississippi and other Mississippi schools in football, basketball and other sports. These competitions take place in accordance with contracts often made a year or more in advance and involving guarantees of and entitlements to substantial sums of money. Many of these contests take place within the State of Mississippi[2].

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[1]During the pendency of this action, a member of this Court has received a flier from the Tulane School of Law announcing a continuing legal education seminar, and soliciting his attendance and participation, for a fee.

[2]On the afternoon of September 27, 1980, the writer of this opinion personally witnessed the Tulane football team doing substantial "business" in Oxford, Mississippi, as it defeated Ole Miss 26-24 in a miserable, drizzling rain.

Tulane is a member of an intercollegiate athletic conference, Metro Athletic Conference, which also has as one of its members the University of Southern Mississippi.

Beyond athletics, there are any number of other forms of intercollegiate competitions between Tulane and Mississippi schools. There are Tulane faculty members who participate in a variety of educational programs, seminars and conferences within the State of Mississippi. Conversely, Mississippians are invited to and participate in comparable programs at Tulane.

Perhaps most important of all, we take judicial notice that Tulane has substantial numbers of alumni and friends in this state, primarily on the Mississippi Gulf Coast and in south and southwest Mississippi. Tulane regularly solicits and receives financial contributions and other forms of gifts from these Mississippians, and derives great benefit therefrom.

One of the educational and service functions performed by Tulane has been the operation of a school of Medicine, in connection with which Tulane operates the Tulane Hospital and Medical Center.

The Tulane School of Medicine operates a program whereby senior medical students and residents may receive on the job training with Mississippi doctors and hospitals. Some Tulane medical students or residents are trained at the University of Mississippi Hospital, Jackson, Mississippi; Veterans Administration Medical Center, Biloxi, Mississippi; and Keesler Air Force Base Hospital, Biloxi, Mississippi.

Tulane faculty members provide lectures at Biloxi hospitals a monthly basis, and opthomology [sic] residents rotate on a short term basis through the VA Hospital in

Biloxi. In addition, the record reflects that Tulane faculty members conduct medical seminars in Meridian, Mississippi.

Tulane conducts continuing medical education programs to which it invites physicians, surgeons and others from all fifty states, including Mississippi. There are some 63 physicians who are members of the staff at Tulane Medical Center who reside in Mississippi.

The Tulane Hospital provides care and treatment for patients who reside in Mississippi. One such patient was Judy Cooley who was treated originally at the Hattiesburg, Mississippi Clinic and on November 12, 1980, was moved to and admitted to the hospital at the Tulane Medical Center, where Plaintiff alleges, she failed to receive the requisite quality of care and consequently died.

In 1976 Tulane opened the Tulane Medical Center Hospital. It represents this 300-bed general hospital to feature the latest in diagnostic and treatment facilities for the patients of Tulane School of Medicine. Private, semi-private and private with sitting room accommodations are provided.

Plaintiff attempted through discovery to develop the extent to which Tulane receives and accepts patients from the State of Mississippi, but Tulane was successful in concealing this information.[3].

C.

On August 4, 1982, Tulane moved to dismiss Cooley's complaint. The motion urged, inter alia, that Tulane had

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[3]Within our knowledge are the facts of *T.C.L., Inc. v.Lacoste*, 431 So.2d 918, 920 (Miss. 1983) wherein a Mississippi patient died while a patient at Tulane Medical Center in 1979.

never qualified to do business within this state; had never done business in Mississippi; has never solicited business in nor placed any advertisements in any publication printed in Mississippi; has never maintained any office, bank account, mailing address, telephone listing, or other business facility in Mississippi; and, in general, had insufficient contacts with Mississippi, to render it constitutionally amenable to judicial jurisdiction[4].

On October 7, 1982, the Chancery Court of Forrest County issued an order overruling Tulane's motion to dismiss. The Chancery Court found that Tulane has been engaged in continuous and systematic activity within the State of Mississippi. Specifically, the chancellor found these activities to be: (1) That Tulane has an affiliation with Mississippi hospitals where several courses are taught in Mississippi to Tulane students; (2) Tulane advertises that clinical courses are taught in Mississippi; (3) Tulane regularly engages in athletic contests with Mississippi schools from which it derives substantial revenue; (4) Tulane has purposefully availed itself of the privileges of conducting activities within this state; (5) even if Tulane had no contacts, ties or relations with Mississippi, the money attached that was in the hands of Gibson's Trust and Gibson's Hattiesburg was sufficiently related to the cause of action to sustain quasi in rem jurisdiction of this case against Tulane; (6) the State of Mississippi has a substantial interest in providing a forum to its citizens harmed by negligent acts of others; (7) the basic equities of this case dictate that the exercise of jurisdiction by the Forrest County Chancery Court is not unfair or unreasonable; (8) requiring the plaintiff to pursue separate causes of action, one in Louisiana and one in Mississippi, against these two alleged

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[4]The term "judicial jurisdiction" is an umbrella term that includes the familiar in personam jurisdiction, in rem jurisdiction, and quasi in rem jurisdiction. *Penrod Drilling Co. v. Bounds*, 433 So.2d 916, 925 fn.3 (Miss. 1983) (Robertson, J., concurring).

joint tortfeasors would serve neither judicial economy nor basic fairness.

On October 16, 1982, the Chancery Court of Forrest County issued an order granting Tulane an interlocutory appeal to this Court.

III.

Tulane first challenges the Chancery Court's determination that it has subject matter jurisdiction of this civil action. Tulane reasons that its conduct upon which Cooley's claim of liability has been predicated occurred in Louisiana; therefore, Louisiana substantive law in the form of the Louisiana Medical Malpractice Act, La.Rev.Stat. §1299.41, *et seq.*, controls the rights and duties of the parties. Therefore, pursuant to the terms of the Louisiana Act, this claim does not lie within the subject matter jurisdiction of the Chancery Court of Forrest County, Missisippi until the claim has been submitted to a medical review panel.

Tulane's thesis belies a fundamental misunderstanding of the concept of subject matter jurisdiction. Simply put, Louisiana has no authority to enact legislation which would affect the subject matter jurisdiction of Mississippi courts.

Cooley invoked the subject matter jurisdiction created by our familiar chancery attachment statutes. Miss. Code. Ann. §§11-31-1, *et seq.* (Supp. 1984). His complaint alleged that Tulane was a nonresident debtor within the meaning of Section 11-31-1. The complaint further alleged that there are persons in this state, to-wit: the University of Southern Mississippi and The Gibson's Trust, which hold effects of or were indebted to Tulane. The fact of the existence in Forrest County, Mississippi, of these effects and indebtednesses has been established and, as previously noted, they have been seized and paid into the registry of the Chancery

Court. The subject matter jurisdiction of the Chancery Court has thereby been established. *Crescent Plywood Co. v. Lawrence,* 305 So.2d 343, 346-347 (Miss. 1974); see also, *Penrod Drilling Co. v. Bounds;* 433 So.2d 916, 925 (Miss. 1983).

The point Tulane makes regarding the applicability of the Louisiana Malpractice Act concerns the choice-of-law issue that must ultimately be confronted by the trial court but which we regard as premature at this time.

IV.

A.

The dispositive question presented on this interlocutory appeal concerns the federal constitutional amendability of Tulane University to the adjudication of its important rights in the courts of Mississippi.

In former days the federal constitutional amenability question would have turned solely on the matter of state power over the res. If the nonresident defendant owned property in the forum state and if that property had been seized in compliance with the law of the state, the courts of the state were thought to have full authority to make a valid and enforceable adjudication regarding the nonresident's rights in the res. *Harris v. Balk,* 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905); *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878); *O. B. Gough v. Mabsco, Inc.,* 335 So.2d 9910 (Miss. 1976).

This power theory has now been "undermined", *Shaffer Heitner,* 433 U.S. 186, 211, 97 S.Ct. 2569, 53 L.Ed. 683, 702 (1977), so that something more than a seized res must be shown. Established constitutional doctrine now provides that nonresidents such as Tulane, owning property in a foreign state, may not be subjected to adjudications of their

rights in that property by the courts of the state in which the property is found, unless they have such contacts with the forum state as would satisfy the requirements of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and progeny. This right -- "immunity" might be a more accurate term -- is secured to Tulane by the due process clause of the Fourteenth Amendment to the Consitution of the United States.

The familiar and oft quoted general principle is that a nonresident may not be subjected to a litigation in a foreign jurisdiction unless he has "certain minimum contacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66S.Ct. 154, 90 L.Ed. 95, 102 (1945). This fairness test, in addition to the old power test, must be met and passed before our courts have the authority to enter a valid and binding adjudication with respect to Tulane's rights in the $147,677.50 seized via this quasi in rem proceeding. *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); *Rush v.Savchuck,* 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed. 2d 516 (1980).

There is no set formulation for resolution of this fairness inquiry. *Shaffer* repeatedly suggests that we must focus our attention upon "the relationship among the defendant, the forum, and the litigation." 433 U.S. at 204, 207, 53 L.Ed.2d at 698, 700. This *Shaffer* suggestion enables us to dispatch two red herrings -- one offered by Cooley, the other by Tulane.

First, notice that the tripartite relationship *Shaffer* would have us focus upon does not include the plaintiff. Nothing in *Shaffer* authorizes us to consider Cooley's interest, wholly legitimate in other contexts, in securing a forum, nor are we concerned with any Mississippi interest in providing a forum for its citizens when asserting claims

against nonresidents. Cooley could sue Tulane in Louisiana, whose courts are no less capable of the fair administration of justice than are ours. Cooley has no interest in securing a convenient forum, nor has this state any interest in providing Cooley a forum, which may overcome Tulane's due process right/immunity articulated in *Shaffer*[5]. This principle was settled in *Kulko v. California Superior Court*, 436 U.S. 84, 98-100, 98 S.Ct. 1690, 56 L.Ed.2d 132, 145-146 (1978), which made it clear that the points argued, though highly relevant on choice-of-law and venue issues, are irrelevant to our judicial jurisdictional inquiry. See *Shaffer v. Heitner*, 433 U.S. 186, 215, 97 S.Ct. 2569, 53 L.Ed.2d 683, 704-705 (1977J); *Hanson v. Denckla*, 357 U.S. 235, 254, 78 S.Ct. 1228, 2 L.Ed.2d 1283, 1298 (1958).

Cooley puts the point another way. He notes that Hattiesburg Clinic, P.A., is also a defendant and argues that he would be inconvenienced in the extreme if he were prevented from suing the two defendants together in the same forum. The argument glosses over the fact that we are here concerned with rights vested in Tulane. Those rights may not be cut down because Cooley has joined a Mississippi

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[5]For the reasons stated above, the Chancellor erred as a matter of law when, in his Order of October 7, 1982, he relied on Mississippi's interest in providing a forum to its citizens harmed by negligent acts of nonresidents. As will be explained below, this error is not fatal.

defendant[6]. The presence of Hattiesburg Clinic, P.A., in the case is relevant only insofar as its relationship with Tulane may supply "contacts" to be considered in passing on Tulane's due process claim. Tulane invokes a right. That we have eschewed any mechanical formulation of that right in no way means we may look to the interests of the plaintiff or the forum in determining its contours and whether it has been offended. See ***Read v. State***, 430 So.2d 832, 840 (Miss. 1983).

Conversely, a significant omission from ***Shaffer's*** three part relational inquiry is any requirement of a direct relationsnip between the res seized and the litigation. ***Shaffer*** makes clear that there are some cases where the presence in the forum state of the nonresident's property related to the litigation will in and of itself suffice to satisfy the minimum contacts standard. ***Shaffer v. Heitner***, 433 U.S. at 207-208, 53 L.Ed.2d at 700. The converse, however, does not follow.

That the allegedly tortious conduct of Tulane occurred in New Orleans, Louisiana, and not in Mississippi -- a fact heavily relied upon by Tulane -- is ***per se*** of no constitutional

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[6]For the reasons stated above, the Chancellor erred as a matter of law when he premised the order appealed from in part on the notion that requiring Cooley to pursue separate actions would serve neither judicial economy nor basic fairness. Because we here adjudicate a claim of right or immunity constitutionally vested in Tulane, these factors -- however important they may be in other contexts -- simply may not be invoked to subject to jurisdiction one lacking ***International Shoe***-style minimum contacts. This error, too, is not fatal.

consequence[7]. Similarly, the fact that there is no substantial connection between the property owned by Tulane in this state and seized by the process of the court and the operative events giving rise to Cooley's claim of liability on the part of Tulane is *per se* of no constitutional consequence. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); *Aycock v. Louisiana Aircraft, Inc.*, 617 F.2d 432 (5th Cir. 1980); *Braman v. Mary Hitchcock Memorial Hospital*, 631 F.2d 6, 8 (2d Cir. 1980). Cf. *Arrow Food Distributors, Inc. v. Love*, 361 So2d 34 (Miss. 1978); *see also Penrod Drilling Co. v. Bounds*, 433 So.2d 916 (Miss. 1983).

Tulane may be subject to an adjudication of its rights in the property seized only if, *in addition* to the seizure of that property, Tulane has contacts with Mississippi such that maintenance of this suit does not offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

In recent years the fairness test of *International Shoe* has been considerably refined. Although we continue to speak of minimum contacts, we are careful to exclude

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[7]The Chancellor erred as a matter of law when he held that the insurance proceeds attached in the hands of Gibson's Trust were sufficiently related to the cause of action to sustain quasi in rem jurisdiction. *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980). That "property" in no way resulted from activities of Tulane in Mississippi or contacts of Tulane with this state. It was procured by Judy Cooley's employer for her benefit wholly apart from anything Tulane has ever done in this state. See *Shaffer v. Heitner*, 433 U.S. 186, 207-208, 97 S.Ct. 2569, 53 L.Ed.2d 683, 700 (1977). Again, the error is not fatal.

"fortuitous" contacts and circumstances. If the nonresident defendant's contacts are fortuitous, not deliberate, ***de minimis***, not substantial, they do not give rise to judicial jurisdiction. ***Worldwide Volkswagen Corp. v. Woodson***, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490, 500 (1980).

The U.S. Court of Appeals for the Eighth Circuit, in ***Iowa Electric Light and Power Company v. Atlas Corporation***, 603 F.2d 1301 (8th Cir. 1979) has aptly added a caveat:

> [T]he minimum contacts relied upon must be between the defendant and the forum state, not simply between the defendant and a resident of the forum state. 603 F.2d at 1303 fn.3.

Of course, the principal manner in which a nonresident may have contacts with the forum state is via contacts with its citizens. Still, the distinction noted in ***Iowa Electric*** is important.

In recent years two descriptions of the fairness test have achieved a currency and usefulness: the purposeful activities test and the foreseeability test. In ***Hansen v. Denckla, supra***, the Supreme Court has said that it is fair that a nonresident defendant be subject to an adjudication of his important rights and duties in the forum state where that defendant has "purposefully availed itself of the privilege of conducting activities within the forum state". 357 U.S. at 253. ***Worldwide Volkswagen Corp. v. Woodson***, 444 U.S. at 197, 62 L.Ed. 2d at 501. These "purposeful activities" should be kept distinct and separate from the "unilateral activity of those who claim some relationship with a nonresident defendant [by virtue of which they] cannot satisfy the requirement of contact with the forum state". ***Hansen v. Denckla***, 357 U.S. at 253; 78 S.Ct. at 1239; ***Benjamin v. Western Boat Building Corporation***, 472 F.2d 723, 730 (5th Cir. 1973).

The foreseeability test derives from *Worldwide Volkswagen* where the Supreme Court stated that the

> "forseeability that is relevant to due process analysis...is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.
> 444 U.S. at 297, 60 L.Ed.2d at 501

In sum, we find it firmly established that no state's court may make valid and enforceable adjudication of the important rights of non-residents if such would be inconsistent with the nonresident defendant's due process rights as articulated in *International Shoes* and progeny. This is so whether the plaintiff proceeds *in personam* against the nonresident or, as here, via a *quasi in rem* attachment action. Since *Shaffer* the test is the same. Before any court of this state may subject Tulane to any form of judicial jurisdiction -- in personam or quasi in rem -- the *International Shoe* originated minimum contracts/purposeful activities/foreseeability/basic fairness formulation of due process must be inquired into and Tulane's rights and immunities wholly respected.

B.

We turn now to the facts of this case and the examination of those facts under legal principles just discussed.

To begin with, Tulane owns funds in Mississippi to the tune of some $147,677.50. Beyond that, we have found that Tulane University is and has been engaged in systematic, continuous and purposeful activities within the State of Mississippi. These activities have been enumerated in some detail in Section II(B) at the outset of this opinion.

By way of summary, Tulane engages in a wide variety

of educational functions involving the recruitment and education of students from Mississippi, the encouragement of alumni activities in Mississippi, including the solicitation of and acceptance of funds from alumni and friends in this state, a variety of intercollegiate competitions and activities, formally and informally, with private and public institutions of the State of Mississippi.

More specifically, the medical school and the Tulane Hospital maintain a variety of ongoing connections with hospitals in the State of Mississippi, with medical practitioners within Mississippi, and with the treatment of patients from Mississippi. Even in the instance of activities conducted at the New Orleans facilities, there are reasonably foreseeable effects in Mississippi, ranging from the response of Mississippi patients to treatments following their return home to the billing of Mississippi residents at their addresses in Mississippi for services rendered.

One important attribute of Tulane's activities in and contacts with Mississippi -- those related to the hospital and medical school as well as other not so related -- is that they are reasonably susceptible to giving rise to litigable disputes. Suffice it to say that Tulane would find the courts of this state open should it have need of such to enforce a claim or right arising out of its Mississippi contacts or activities.

Without further ado, we hold that, on these facts, the Chancellor was imminently correct when he held that Tulane University had engaged in continuous and purposeful activities within the State of Mississippi sufficient to render it constitutionally amenable to an adjudication of its rights in the funds held by the Clerk of Court.

For many of the same reasons, Tulane has sufficient contacts with the State of Mississippi that it should reasonably forsee being required to defend an action in the courts

of Mississippi and so that the maintenance of this action would not offend traditional notions of fair play and substantial justice.

C.

We have considered the argument that, subjecting Tulane to suit in Mississippi may have a chilling effect on Tulane Hospital's continued provision of hospitalization and other health care services to residents of Mississippi. The point is without merit, legally and factually. That a nonresident may threaten to terminate contacts with a given state in no way enhances its due process rights beyond the formulations provided in *International Shoe* and progeny. Factually, Tulane has no more to fear from the courts of this state than it does from Louisiana courts. Tulane will receive the same evenhanded justice it would receive in Louisiana, the same as a Mississippi university or hospital would receive here.

Further, nothing turns on the fact that Tulane is not a corporation organized for profit. Substantial and purposeful activities in this state make it reasonably foreseeable that Tulane may be sued here, whether those activities were intended to, or did, result in profit. Put another way, nonprofit corporations enjoy the same protections under *International Shoe* and progeny as do corporations organized for profit, no greater, no less.

Nothing in Tulane's motion to dismiss or on this interlocutory appeal turns on the merits *vel non* of Cooley's claim or Tulane's defense. That we may perceive Cooley's claim strong or weak or Tulane's conduct laudatory or egregious is for the moment beside the point. We are concerned here with a preliminary point -- whether the Chancery Court of Forrest County has the authority, consistent with Tulane's due process rights, to make a valid and

enforceable adjudication of the merits *vel non* of Cooley's claim and Tulane's defense and ultimately of Tulane's rights in the property seized.

Finally, nothing turns on the fact that the great bulk of Tulane's activities take place in Louisiana, that its nerve center is in New Orleans. To be sure, the extent of activities engaged in by Tulane in Mississippi is relatively small vis-a-vis Louisiana. Tulane's amenability to suit in Mississippi turns on the extent of its activities here without regard to what or how much more it may do in Louisiana or elsewhere.

D.

In making our determination that the Chancery Court of Forrest County, Mississippi has authority to hear and adjudicate the rights and interests of the parties in the sum of $147,677.50 presently resting in the registry of the Court, we have given careful consideration to the reported cases concerning nonresident medical facilities.

Braman v. Mary Hitchcock Hospital, 631 F.2d 6 (2d Cir. 1980) bears similarities to the case at bar. In that case the plaintiff, a citizen of Vermont, brought suit in Vermont against a New Hampshire hospital charging negligent care in New Hampshire. Hitchcock Hospital had more contacts with Vermont than Tulane Hospital has with Mississippi. Approximately one-third of Hitchcock's patients came from Vermont. Tulane has successfully resisted discovery to the extent that we do not know what percentage of its 300 beds have been occupied by Mississippians in recent years. On the facts before it, the Court of Appeals for the Second Circuit correctly held that the New Hampshire hospital was constitutionally amenable to suit in Vermont.

In *Soares v. Roberts*, 417 F. Supp. 304 (D.R.I., 1976) a non-profit Massachusetts medical facility had been sued in Rhode Island. The evidence reflected that the defendant, largely an abortion clinic, had advertised and solicited patients from Rhode Island for some three years prior to the suit. The nonresident defendant was held constitutionally amenable to suit in Rhode Island.

On the other hand, *Wolf v. Richmond County Hospital Authority*, _____ F.2d _____ (4th Cir. No. 84-1024, decided October 4, 1984) arguably supports Tulane's position. The question in *Wolf* was whether an Augusta, Georgia hospital's contacts with South Carolina were sufficient to render the hospital constitutionally amendable to suit in South Carolina for allegedly negligent care rendered a South Carolina resident while a patient in the hospital in Augusta, Georgia. In the face of proof that the hospital received roughly one-fifth of its gross income from South Carolina patients, the Court of Appeals held it was not subject to suit in South Carolina. To like effect is *Walters v. St. Elizabeth Hospital Medical Center*, 543 F. Supp. 559 (W.D.Pa. 1982).

We distinguish *Wolf* and *Walters* from the case at bar. In *Wolf* and *Walters* the only contacts being examined were the hospital's. Here the defendant is the corporate entity, Tulane University. We look not only at the Mississippi-oriented contacts and activities of the Tulane Hospital but of the entire university.

The only case we have found in which a university hospital was the defendant is *Gelineau v. New York University Hospital*, 375 F. Supp. 661 (D.N.J. 1974). In *Gelineau* the District Court held that New York University Hospital was not constitutionally amenable to suit in New Jersey when sued by a New Jersey resident for allegedly negligent

care in New York. Inexplicably, the Court seems to consider only the hospital's contacts with New Jersey rather than the totality of New Jersey-oriented contacts and activities of the corporate entity, New York University. In this we regard *Gelineau* as having been incorrectly analyzed and, accordingly, incorrectly decided.

All things considered, nothing in any of these hospital cases undermines our confidence in the correctness of our adjudication on this interlocutory appeal: that under the totality of the circumstances, Tulane may be held constitutionally amenable to the adjudication in the Chancery Court of Forrest County, Mississippi, of its rights in and to the $147,667.50 now held in the registry of the Court. The Chancellor correctly overruled the motion to dismiss.

V.

Tulane next argues that the doctrine of sovereign immunity precludes this suit. Fleshed out, the theory is that the University of Southern Mississippi and the Board of Trustees of Institutions of Higher Learning, State of Mississippi, enjoyed sovereign immunity at the time the $48,182.00 in football game proceeds were attached[8].

Sovereign immunity is a defense "personal" to the state or its political subdivision. No third party has standing to invoke it. After a few preliminary skirmishes, the record reflects that USM and the Board of Trustees have waived sovereign immunity, have paid into the registry of the court all sums they held due and owing to Tulane, and have been

[8]This suit was brought prior to the July 1, 1984, effective date for the abolition of sovereign immunity. *Pruett v. City of Rosedale*, 421 So.2d 1046 (Miss. 1982).

finally dismissed. In this context, Tulane's point is seen wholly without merit.

VI.

No other point presented by Tulane being worthy of mention, the Order of the Chancery Court of Forrest County, Mississippi, entered October 7, 1982, overruling and denying Tulane's motion to dismiss shall be, and the same hereby is, affirmed. This matter is remanded to the active docket of the Chancery Court for such further proceedings as may be appropriate.

AFFIRMED AND REMANDED

PATTERSON, C.J.: WALKER, P.J.: ROY NOBLE LEE, PLJ.: BOWLING, HAWKINS, DAN M. LEE AND PRATHER, JJ., CONCUR. SULLIVAN, J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 13, 1985

THE COURT SITING EN BANC:

54,500 The Administrators of the Tulane Education Fund, A Corp., et al. v. Duane Cooley, Chancery, Forrest; Petition for Rehearing Denied. Sullivan, Jr., Not Participating.

APPENDIX II

IN THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

DUANE COOLEY, PLAINTIFF

VERSUS CASE NUMBER 40,864

ADMINISTRATORS OF THE TULANE EDUCATION FUND, A Corporation, THE HATTIESBURG CLINIC, P.A., A Corporation, ET AL DEFENDANTS

ORDER GRANTING INTERLOCUTORY APPEAL

THIS CAUSE coming on for hearing on Petition of the Administrators of the Tulane Education Fund, A Corporation, for an interlocutory appeal from order of the Chancery Court of Forrest County, Mississippi, dated October 7, 1982, overruling Motions of said petition to dismiss for lack of jurisdiction over said defendant, and the Court, having considered the matter and being fully informed in the premises is of the firm opinion that this is one of those cases in which an interlocutory appeal is in the best interest of all parties in order to settle all of the controlling principles involved in the cause and to avoid expense and delay, and that the same should be and it is hereby granted; and the Court further finds that there is no need for a supersedeas appeal and no need for a bond, but that pursuant to Section 11-51-29 of the Mississippi Code of 1972, as amended, the interlocutory appeal shall be granted to the administrators of the Tulane Education Fund, a corporation, upon prepayment by said defendant of the costs in this Court including the cost of the preparation of the record of the proceedings and the fee prescribed in Section 25-7-3 of the Mississippi Code of 1972,

and that no further bond shall be required of said defendant.

IT IS, THEREFORE, ORDERED that an interlocutory appeal is granted to the administrators of the Tulane Education Fund, a corporation, from Order dated Octover 7, 1982, overruling Motions of said defendant to dismiss for lack of jurisdiction as to it, and that said defendant shall prepay all of the costs in this Court including the cost of the preparation of the record and the fee prescribed in Section 25-7-3 of the Mississippi Code of 1972, and that no further bond be required of defendant.

SO ORDERED on this 16th day of October, A.D., 1982.

/s/ Sebe Dale, Jr.

CHANCELLOR

APPENDIX III

IN THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

DUANE COOLEY — PLAINTIFF

VERSUS — CAUSE NO. 40,864

THE ADMINISTRATORS OF THE TULANE EDUCATION FUND, A Corporation, THE HATTIESBURG CLINIC, P.A., A Corporation, et al — DEFENDANTS

ORDER

THIS DAY THIS CAUSE came on to be heard on the Motions by the Defendant, THE ADMINISTRATORS OF THE TULANE EDUCATION FUND, a corporation, to dismiss his action for lack of in rem jurisdiction over the property attached and for lack of subject matter jurisdiction by this Court, and the Court having reviewed the record, including the pleadings, the memoranda filed by the parties and having heard and considered the oral argument of the parties, and being advised in the premises, finds as follows:

I.

The Court finds that while the University known as Tulane University is comprised of several parts, there exists only one legal entity, that being THE ADMINISTRATORS OF THE TULANE EDUCATION FUND, a Louisiana corporation, which operates the University, including the Tulane Medical Center and School.

II.

The Court finds that THE ADMINISTRATORS OF

THE TULANE EDUCATION FUND is engaged in continuous systematic activity within the State through its medical school and its ongoing relationship and affiliation with Mississippi hospitals whereby several courses are taught in Mississippi to Tulane's medical students whereby the reputation of Tulane's medical school and facilities is substantially enhanced. The Court finds the Defendant Tulane's argument that the student instruction in Mississippi is solely for the benefit of the student and not the University to be totally unconvincing. Rather, in fact, Tulane advertises in soliciting students that clinical courses are taught in Mississippi as an inducement to those students to attend the University Medical School.

The Court further finds that THE ADMINISTRATORS OF THE TULANE EDUCATION FUND is engaged in substantial and continuous activity in the State of Mississippi in the performance of athletic events including football and basketball within this State; that THE ADMINISTRATORS OF THE TULANE EDUCATION FUND both substantially enhances the reputation of the University as well as derives hundreds of thousands of dollars from these activities alone.

The Court finds that THE ADMINISTRATORS OF THE TULANE EDUCATION FUND has purposely availed itself of the privileges of conducting activities within the State. Similarly, the Court finds that more than minimum contacts exist between THE ADMINISTRATORS OF THE TULANE EDUCATION FUND and this State, such that the exercise of in rem jurisdiction in this forum does not offend due process.

III.

However, the Court finds that even if the Defendant, THE ADMINISTRATORS OF THE TULANE EDUCATION FUND, had no contacts, ties, or relations with this State, the property attached pursuant to the Mississippi

Attachment Statute, Section 11-31-1, et seq., and specifically the monies attached, which were owed by the Gibson's Employers Benefit Trust Fund to Tulane by virtue of the allegedly defective medical services rendered to the Plaintiff's decedent and which monies were tendered into this Court by the Garnishee-Defendants, is sufficiently related to this cause of action to sustain the exercise of in rem jurisdiction.

IV.

Further, the Court finds that the exercise of jurisdiction by this forum is neither unfair nor unreasonable. The State of Mississippi has a substantial interest in providing a forum to its citizens who are harmed through the negligence of others. Similarly, this Court is not a distant forum to the Defendant, THE ADMINISTRATORS OF THE TULANE EDUCATION FUND. Rather, this Court provides the most convenient forum for all the parties.

Finally, basic equities dictate that the exercise of jurisdiction by this Court is neither unfair nor unreasonable. The Defendants, THE ADMINISTRATORS OF THE TULANE EDUCATION FUND and THE HATTIESBURG CLINIC, P.A., a Mississippi corporation, are sued jointly and severally. If these Defendants are ultimately determined to have been actionably negligent and that such negligence contributed to or caused harm to the Plaintiff's decedent, the Defendants are joint tort-feasors. Requiring the Defendant, THE ADMINISTRATORS OF THE TULANE EDUCATION FUND, to defend this action in this forum is not unreasonable. The Plaintiff's interest in obtaining convenient and effective relief would not be adequately protected by a choice of forum other than this Court. Similarly, to require the Plaintiff to prosecute separate actions, one in Louisiana and one in Mississippi, against each of these Defendants would serve neither judicial economy nor basic fairness.

For these reasons, the court finds that the exercise of in rem jurisdiction in this action does not violate fair play nor substantial justice.

V.

Finally, the Court finds that it has subject matter jurisdiction over both Defendants. The Court therefore finds that the Motions of the Defendant, THE ADMINISTRATORS OF THE TULANE EDUCATION FUND, to dismiss this action for lack of in rem jurisdiction and lack of subject matter jurisdiction should be overruled.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motions of THE ADMINISTRATORS OF THE TULANE EDUCATION FUND to dismiss the action for lack of in rem jurisdiction and lack of subject matter jurisdiction by this Court be and the same are hereby overruled.

THIS, the 7th day of October, A.D., 1982.

/s/ Sebe Dale, Jr.

CHANCELLOR

APPENDIX IV

INTHE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

DUANE COOLEY — COMPLAINANT

VERSUS — CIVIL ACTION NO. 40,864

ADMINISTRATORS OF THE TULANE EDUCATION FUND, A Corporation; THE HATTIESBURG CLINIC, P.A.; A Corporation — DEFENDANTS

BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING; THE UNIVERSITY OF SOUTHERN MISSISSIPPI; AND THE UNIVERSITY OF MISSISSIPPI; GIBSON'S STOREOWNERS ASSOCIATION EMPLOYER BENEFIT TRUST; GIBSON'S DISTRIBUTORS OF HATTIESBURG MISSISSIPPI INC. — ATTACHMENT-DEFENDANTS

ORDER

THIS CAUSE came on for hearing, and this Court finding as follows:

I.

That the Board of Trustees of State Institutions of Higher Learning; the University of Southern Mississippi; and the University of Mississippi; have filed an Amended Answer admitting an indebtedness to the Administrators of the Tulane Education Fund in the sum of Forty-eight

Thousand One Hundred Eighty-two Dollars ($48,182.00), and having tendered the same into this Court.

II.

And the Court finding that said sum of Forty-eight Thousand One Hundred Eighty-two Dollars ($48,182.00), has been deposited in a restricted account in a financial institution, federally insured, for the use and benefit of the Defendant, Tulane.

III.

And the Court finding that the Attachment-Defendants, the Board of Trustees of State Institutions of Higher Learning; the University of Southern Mississippi; and the University of Mississippi; along with Gibson's Storeowners Association Employer Benefit Trust and Gibson's Distributors of Hattiesburg, Mississippi, Inc., should be discharged and dismissed from this cause.

IV.

That the monies represented by the indebtedness to Tulane, tendered into Court by the above enumerated Attachment-Defendants, should remain in a restricted account with a federally insured financial institution, said funds to be placed in an interest-bearing account for the use and benefit of the Administrators of the Tulane Education Fund, and to be withdrawn only upon further Order of this Court.

IT IS THEREFORE ORDERED, AND ADJUDGED that the Attachment-Defendants, the Board of Trustees of State Institutions of Higher Learning; the University of Southern Mississippi; and the University of Mississippi, along with the Gibson's Storeowners Association Employer Benefit Trust and Gibson's Distributors of Hattiesburg Mississippi, Inc., a corporation, all be discharged and dismissed from this cause.

IT IS FURTHER ORDERED, AND ADJUDGED, that the said funds in the sum of Forty-eight Thousand One Hundred Eighty-two Dollars, ($48,182.00), be placed in the same interest-bearing, restricted account, in the financial institution, federally insured, wherein those funds were previously deposited which were tendered into Court by the Attachment-Defendants, Gibson's Storeowners Association Employer Benefit Trust and Gibson's Distributors of Hattiesburg Mississippi, Inc., said funds be placed in an interest-bearing account for the use and benefit of the Administrators of the Tulane Education Fund, and to be withdrawn only upon further Order of this Court.

IT IS ORDERED, AND ADJUDGED, that such financial institution, federally insured, wherein all of the said funds are on deposit in a restricted account for the use and benefit of the Defendant, Tulane, be presented with a copy of this Court's Order, directing that no withdrawal be made from the said account except upon further Order of this Court.

SO ORDERED, AND ADJUDGED, on this 24th day of February, A.D., 1982.

/s/ Sebe Dale, Jr.

CHANCELLOR

APPENDIX IV

IN THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

DUANE COOLEY — COMPLAINANT

VERSUS — CAUSE NO. 40,864

ADMINISTRATORS OF THE TULANE EDUCATION FUND, A Corporation; THE HATTIESBURG CLINIC, P.A.; A Corporation, et al — DEFENDANTS

BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING; THE UNIVERSITY OF SOUTHERN MISSISSIPPI; AND THE UNIVERSITY OF MISSISSIPPI; GIBSONS STOREOWNERS ASSOCIATION EMPLOYER BENEFIT TRUST; GIBSON'S DISTRIBUTORS OF HATTIESBURG MISSISSIPPI INC. — ATTACHMENT-DEFENDANTS

ORDER

THIS DAY THIS CAUSE came on to be heard upon the pleadings of the Attachment-Defendants, the Gibson's Storeowners Association Employer Benefit Trust and Gibson's Distributors of Hattiesburg Mississippi Inc., and these parties appearing by and through their Solicitors of record and the Court being advised in the premises finds as follows:

I.

That the Attachment-Defendant, the Gibson's Storeowners Association Employer Benefit Trust, has admitted its indebtedness to the Defendant, the Administrators of the Tulane Education Fund, in the amount of Ninety-nine Thousand, Four Hundred and Ninety-six Dollars ($99,496.00). That the Attachment-Defendant, Gibson's Distributors of Hattiesburg Mississippi, Inc., has admitted that it presently holds checks payable to the Defendant, Tulane, in the same amount of Ninety-nine Thousand, Four Hundred and Ninety-six Dollars ($99,496.00), which checks are drawn on the account of Gibson's Storeowners Association Group Insurance Trust, which trust is controlled and administered by the Attachment-Defendant, Gibson's Storeowners Association Employer Benefit Trust.

II.

That the Gibson's Distributors of Hattiesburg Mississippi Inc. has tendered into this Court those checks, copies of which are attached to the Answer of this Defendant, totalling the sum of $99,496.00 and that this Defendant should be discharged.

III.

That upon the tender into this Court of this sum of Ninety-nine Thousand, Four Hundred and Ninety-six Dollars ($99,496.00) by the Attachment-Defendant, the Gibson's Storeowners Association Employer Benefit Trust, this Attachment-Defendant should also be discharged. Further, the Clerk of this Court, upon the receipt of said funds, should return, via registered mail, those checks tendered into this Court by Gibson's Distributors of Hattiesburg Mississippi Inc., to Gibson's Storeowners Association Employer Benefit Trust.

IV.

That upon the receipt of said funds, the Clerk should be directed to place said funds in an interest-bearing account until further Order of this Court.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that having tendered into this Court the checks, enumerated above and totalling $99,496.00, the Attachment-Defendant, the Gibson's Distributors of Hattiesburg Mississippi Inc., is discharged from this action.

IT IS FURTHER ORDERED AND ADJUDGED, that the receipt in this Court of the sum of Ninety-nine Thousand, Four Hundred and Ninety-six Dollars ($99,496.00) from the Attachment-Defendant, the Gibson's Storeowners Association Employer Benefit Trust, this Attachment-Defendant shall be discharged. Further, the Clerk is hereby directed to return to Gibson's Storeowners Association Employer Benefit Trust, those checks tendered in the Court by Gibson's Distributors of Hattiesburg Mississippi Inc. in the total sum of Ninety-nine Thousand, Four Hundred and Ninety-six Dollars ($99,496.00) to the Attachment-Defendant the Gibson's Storeowners Association Employer Benefit Trust, via registered mail.

IT IS FURTHER ORDERED AND ADJUDGED, that upon the receipt of the sum of Ninety-nine Thousand, Four Hundred and Ninety-six Dollars ($99,496.00), the Clerk shall and is hereby directed to place and hold said funds in an interest-bearing account until further Order of this Court.

SO ORDERED, ADJUDGED, AND DECREED, this 13th day of October, A.D., 1981.

/s/ Sebe Dale, Jr.

CHANCELLOR

APPROVED AS TO FORM:

/s/ Moran M. Pope

Moran M. Pope
Attorney for Gibson's
Distributors of Hattiesburg
Mississippi Inc.

/s/ Dan R. Wise

Dan R. Wise
Attorney for Gibson's Storeowners
Association for
Employer Benefit Trust

APPENDIX VI

ATTACHMENT IN CHANCERY AGAINST NONRESIDENT, ABSENT OR ABSCONDING DEBTORS

§11-31-1. Jurisdiction; debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

§11-31-2. Application for order of attachment; determination.

(1) Upon the filing of the bill of complaint, the complainant may apply for an order of attachment by presenting to the chancellor the bill, and an affidavit which shall include the following:

(a) A statement that the action is one described in section 11-31-1, and is brought against a defendant described in said section 11-31-1.

(b) A detailed statement of the facts and grounds which entitle the complainant to an order of attachment including a statement of the specific reasons why the complainant's ability to recover the amount of his claim may be endangered or impeded if the order of attachment is not issued.

(c) A statement of the amount the plaintiff seeks to recover.

(d) A statement that the complainant has no information or belief that the claim is discharged in a proceeding under the Federal Bankruptcy Act (11 U.S.C., Section 1, et seq.), or that the prosecution is stayed in a proceeding under the Federal Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment and a statement that the complainant is informed and believes that such property is not exempt from attachment or seizure under section 85-3-1.

(f) A listing of other persons known to the complainant who may have an interest in the property sought to be attached together with a description of such interest.

(2) The chancellor shall examine the affidavit and bill of complaint and may, in term time or in vacation, issue an order of attachment with respect to such property under the following conditions:

(a) The chancellor finds that unless the order of attachment is issued, the complainant's ability to recover the amount of his claim may be significantly impaired or impeded.

(b) The chancellor finds that the affidavit establishes a prima facie case demonstrating the complaint's right to recover on his claim against the defendant.

(c) The complainant gives security in an amount satisfactory to the chancellor to abide further orders of the court and to protect the defendant from injury should the action of attachment be judicially determined to have been wrongfully brought.

(3) (a) If such an order of attachment is issued, the defendant shall, upon request, be entitled to an immediate post-seizure hearing to seek dissolution of the order of attachment. Such post-seizure hearing shall have precedence on the docket of the chancery court over all other matters except similar matters previously filed. At such hearing, the chancellor shall order dissolution of the order of attachment unless the complainant establishes by satisfactory proof the grounds upon which the order was issued, including the

existence of a claim as described in section 11-31-1, and the impairment or impediment which a failure to continue the attachment could bring to the complainant's ability to recover the amount of such debt. An appearance by the defendant at the post-seizure hearing shall be considered a special appearance and not a general appearance for purposes of personal jurisdiction over the defendant.

(b) In the alternative, a debtor may regain immediate possession of the property attached by giving security satisfactory to the chancellor in an amount equal to one hundred twenty-five percent (125%) of the value of the property attached or one hundred twenty-five percent (125%) of the amount of the claim, whichever is less.

(c) If the chancellor should determine that the attachment was not brought in good faith, then the chancellor in his discretion may award actual damages (including reasonable attorney's fees) to the defendant.

§11-31-3. How effects or indebtedness bound.

When a bill shall be filed for an attachment of the effects of a nonresident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of persons in this state to such nonresident, absent or absconding, it shall be sufficient to bind such effects or indebtedness that the order of attachment together with a copy of the bill of complaint and affidavit be served upon the persons possessing such effects or owing such indebtedness.

§11-31-5. How land levied on.

If the land of the nonresident, absent or absconding debtor be the subject of such suit, and an order of attachment be issued, the order shall be levied by the sheriff or other officer as such writs of law are required to be levied on land, and shall have like effect.

§11-31-9. Publication for defendant and his appearance.

The nonresident, absent or absconding debtor shall be made a party to such suit by publication of summons as in other cases, and may appear and plead, demur or answer to the bill without giving security. If such debtor fails to appear, the court shall have power to make any necessary orders to restrain the defendants within this state from paying, conveying away or secreting the debts by them owing, or the effects in their hands belonging to, the nonresident, absent or absconding defendant, and may order such debts to be paid or such effects to be delivered to the complainant on his giving security for the return thereof in such manner as the court may direct.